IN THE

Supreme Court of the United States

No. 83, October Term, 1946.

INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA COAL COMPANY and ERIE RAILROAD COMPANY,

Appellants,

vs.

WILLIAM SCHEELE, Recorder of the Township of SADDLE RIVER, and the TOWNSHIP OF SADDLE RIVER, a municipal corporation of the State of New Jersey,

Appellees.

JAMES THOMPSON,

Appellant,

vs.

WILLIAM SCHEELE, Recorder of the Township of SADDLE RIVER, and the TOWNSHIP OF SADDLE RIVER, a municipal corporation of the State of New Jersey,

Appellees.

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS.

APPELLANTS' REPLY BRIEF.

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This reply brief is limited to such parts of Appellees' brief, received November 8, 1946, as require answer. Some of the decisions cited in Appellees' brief are discussed in Appellants' main brief. Some of them are not mentioned herein because they are manifestly inapposite. Others are mentioned herein for reasons hereinafter indicated.

References herein to Appellees' brief are indicated by the initials "AB" with page numbers.

General Observations.

(a)

The Statement of the Case (pp. 2-9) and the argument under Point I, in Appellees' brief, proceed entirely upon the theory that the coal while stopped at Coalberg was not in interstate commerce. That is the central and controlling issue presented under Point I of Appellants' main brief. So complete is Appellees' reliance upon that theory that they do not deign to notice any of the decisions, or authorities, upon which Appellants rely in Parts (14) and (15) of the Statement (pp. 35-45), and Point I (pp. 46-98), of Appellants' main brief as support for an opposite contention. None of the cases cited in Appellees' brief involve in-transit, or other facilities or services governed by the Interstate Commerce Act or transportation tariffs published and filed pursuant thereto.

(b)

Appellees' argument admits, in effect, that the purpose of this license exaction was to obtain revenue *from those who conducted* the business at Coalberg (who did not own, and were not taxable for, any of the coal in storage) in lieu of the ad valorem taxes previously *levied against the*

owners of the coal, which were set aside by the New Jersey courts in *Pattison & Bowns* v. *Township of Saddle River*, 129 N. J. L. 135, aff. 130 N. J. L. 177, and *Independent Warehouses, Inc.* v. *Township of Saddle River*, 129 N. J. L. 137, aff. 130 N. J. L. 217, because the coal was exempt from taxation under the New Jersey tax laws.

The complaint (p. 4) of the loss of revenues through the tax exemption statute which was sustained by those decisions, is one that the courts cannot remedy. The only recourse is to the legislature.

(c)

The principal argument throughout the brief is that, by the "device" of commercial storage, Appellants, or some of them, sought to escape their fair share of the tax burdens necessary for the support of the government. This is not the fact.

The decision in *Knoxville & O. R. Co.* v. *Harris*, 99 Tenn. 684, 53 L. R. A. 921, cited and quoted at pages 39-40 of Appellees' brief in support of this argument, rather defeats the purpose of the citation. The quotation itself shows that, in that case, the state tax was sustained by the state court because the tax in question applied only to railroads "not paying an ad valorem tax to the state", and because those railroads "are not otherwise making *any* contribution to the support of the state government that protects their business and property in the same manner that it does those of the companies of the other class, which are contributing their part to that support by the payment of an ad valorem tax." The railroads that were free from the particular tax in question in that case were those paying ad valorem taxes. This record shows that all ad valorem and other taxes leviable under New Jersey law are being

regularly assessed upon, and paid by, each of these Appellants (Appellants' main brief, pp. 86-93). The tabulation on page 13 of Appellants' main brief shows that ad valorem taxes were levied upon all of the real and personal property at the Coalberg plant ($7,770.98 per year) as admitted at page 87 of Appellees' brief.

It is argued that the per-ton rate of the tax imposed by the license fee is less than the per-ton rate that would have been applicable under ad valorem taxes on the coal at the local tax rate (p. 4). This argument overlooks the following important points:

(1) The coal was exempt from the taxation under the laws of the state, which is a legislative, and not a judicial, matter.

(2) The per-ton rates mentioned in support of that argument at pp. 4, 47-48, were calculated on hypothetical bases of tonnage and areas, and not upon actual tonnage in storage at any time or actual areas used at any time for coal storage, as is shown in Appellants' main brief (pp. 140-143). The record shows that, as construed by the Township officials in the complaints and convictions, the ordinance would impose the equivalent of a tax of $1.50 for each ton of coal stored in 1943 (R. 87).

(3) An ad valorem tax on the coal that would have been levied by the Township, included taxes levied for the support of the state and county governments, namely, state schools, county government, county hospitals, and District Courts, *Twelfth Annual Report of State Tax Department of N. J.* for the year 1943, p. 127; officially published pursuant to New Jersey laws (R. S. 54:1-13).

Hence, Appellees' comparison of rates-per-ton fails to distinguish between the license tax which would go entirely

to the Township government, and ad valorem taxes of which only a part belonged to the Township government.

(4) The amount of the license fee, or tax, per ton of coal, or otherwise, is immaterial because the privilege of conducting that business cannot be interdicted, taxed or regulated by local ordinance, *New Jersey Bell Tel. Co.* v. *State Board,* 280 U. S. 338, 346, 347, 349; *Sprout* v. *South Bend,* 277 U. S. 163, 171, 172, and other cases cited in point 4 of Appellants' main brief.

(d)

Appellees' Statement of the Case (pp. 2-7) and their argument (pp. 25-27, 28) is devoted primarily to the support of the contention that there was no change or difference in the nature and conduct of the Coalberg business after February 25, 1939, when Coalberg became a railroad tariff transit station, from the nature and conduct of the business at Coalberg by the private lessees prior to that date. The brief (first line p. 39) admits that Coalberg was "operated as a private warehouse" prior to that date.

Following are some of the examples of such statements and arguments:

AB p. 5: The statement that "aside from the fact that the plant then (after February 25, 1939) carried the name Independent Warehouses, Inc. there was no other change in the method of operation (R. 154)" is incorrect. That record reference relates only to the *duties* of the witness, James Thompson, who was manager of the yard (R. 151). The witness was previously employed by Pattison & Bowns who was the private lessee of the property (R. 154), and he was testifying to his duties prior to the change made "when the Erie took over" (R. 155) on February 25, 1939 (Ex. P-4, R. 20, 83). Prior to that date his duties related only

to "spot storage" rendered for Pattison & Bowns and other private users at the yard (R. 155).

AB p. 5: The statements that the Erie-Coal Company agreement "made no change in the then existing system of *operation*" is incorrect, and the statement that that agreement provided that the Coal Company "would continue its present operation of the storage yard," is true only in the limited sense of the physical operation of the machinery and equipment. The recitals and text of Exhibit P-4 (R. 20, 83) and the uncontradicted evidence (R. 85, 109, 127, 128) unmistakably show that from and after February 25, 1939 the object, purpose, function, and legal effect of the Coalberg facilities and services were radically changed from a private storage yard used solely for the coal owned by, and held in the possession of, private coal dealers, into a public service facility, available to all shippers, provided by an interstate carrier under section 1(3)(a), and other sections of the Interstate Commerce Act, exclusively for the in-transit storage of coal in possession of the carrier during its interstate transportation under through routes and through rates between shipping points in Pennsylvania and ultimate destinations in other states, with a stop-over privilege of in-transit storage at Coalberg under the provisions of tariffs filed with I. C. C.

The case of *Pennsylvania Coal Company* v. *Saddle River Township*, 96 N. J. L. 40 (cited AB, pp. 3, 6, 10, 24, 26), was decided by the New Jersey Supreme Court in 1921, and sustained property taxes levied by the Township upon the coal owned by the Coal Company on October 1, 1919, when Coalberg was used as a private storage yard. Coalberg continued as a private storage yard until February 25, 1939, and personal property taxes on the coal were levied against, and paid by, the individual owners of the coal each year

down to, and including, the year 1939, for which the coal was assessed as of October 1, 1938 (R. S. 54:4-1, 54:4-11).

On December 1, 1938 the private lessees of Coalberg surrendered possession of the storage plant (Ex. P-4, R. 20, 21) and thereafter arrangements were made, effective February 25, 1939, for the use of Coalberg by Erie as a public service facility, available to all shippers, for shipments from any of the stations in the anthracite regions of Pennsylvania, on five different railroads listed in the tariff (Ex. P-12, R. 55, 110), for in-transit storage and servicing of interstate shipments of coal, pursuant to the provisions of an Erie tariff issued January 24, 1939, filed with I. C. C., and effective February 25, 1939, co-incident with the change in the use and operation of Coalberg (Ex. P-4, R. 20, Sections 1 and 2, R. 22). Provision was made in Section 3 of that agreement (R. 22) for an agent to be maintained by Erie at Coalberg authorized to issue warehouse receipts to shippers for stored coal, and Independent Warehouses, Inc. was later designated as such Erie agent. Section 3 of the agreement also provided that Pennsylvania Coal Company would, as agent, and at the sole expense, of Erie, furnish the employees for the physical operation of the plant and equipment.

These changes in the purpose, function and operation of the Coalberg plant had been accomplished before, and were in effect on, October 1, 1939 which was the assessment date for 1940 taxes. The Township levied taxes for 1940 on the coal in storage, as of October 1, 1939, and did so again for 1941 on coal in storage as of October 1, 1940. These taxes were not levied against Erie or Independent or Pennsylvania Coal Company, because neither of them was the owner of any coal. These taxes were levied against the several owners of the coal, *Pattison & Bourne v. Township of Saddle*

River, 129 N. J. L. 135, at page 135 (aff. 130 N. J. L. 177). In that case the taxed owners of the coal contested the assessments and taxes for 1940 and 1941, and they were set aside because the coal was in commercial storage and was exempt from taxation. The opinion of the state Supreme Court in that case shows that nine reasons were assigned by prosecutors for invalidating the assessments and taxes but that the court deemed it necessary to "consider but one of them" (opinion, p. 135).

In the *Pattison & Bowns* case (*supra*) and in the companion case of *Independent Warehouses* v. *Saddle River Township*, 129 N. J. L. 137, aff. 130 N. J. L. 217, the Township sharply contended, as it does here, that there had been no change in the operation of the Coalberg plant, or the status of the coal in storage, as a result of the change made on February 25, 1939, and, therefore, the coal was still taxable by the Township. In fact, that was the decisive issue in those cases. That contention was there overruled, on questions of both fact and law, by the State Supreme Court and its decision was affirmed by the Court of Errors and Appeals. No attempt was made to review that decision in this Court.

Consequently, Appellees' argument of that issue in this case is a *re-argument* of the same contention unsuccessfully urged by the Township in the above mentioned *Pattison & Bowns* and the *Independent Warehouses, Inc.* cases before the state courts.

Hence, as between the Township of Saddle River and Independent Warehouses, Inc. and their privies, respectively, these issues were settled, if not rendered *res judicata*, in the two last mentioned cases.

Appellees' argument is, in this respect, a collateral attack upon those decisions, and an improper attempt to

obtain from this court a decision different from, and in reversal of, the decisions of the New Jersey courts on that issue.

Specific Observations.

"Statement of the Case."

AB p. 3: The decision in *Pennsylvania Coal Co.* v. *Saddle River*, 96 N. J. L. 40 (also referred to at AB pp. 6, 10, 24-25, 26) involved a contest of local assessments of personal property taxes on the coal stored at Coalberg by Pennsylvania Coal Company which had mined, but had not yet sold, the coal. The coal was the sole property, and was in the sole possession, of that company.

The Court held that that case was indistinguishable from *Lehigh & Wilkes-Barre Coal Co.* v. *Junction*, 75 N. J. L. 68 and *Susquehanna Coal Co.* v. *South Amboy*, 76 N. J. L. 412, aff. 77 N. J. L. 796, aff. 228 U. S. 665 (cited at AB pp. 16-17, 19-21) because "no interstate commerce feature being involved" (p. 41). The only questions involved in that case related to the taxability of property affected by the World War I legislation then in effect (pp. 42-43). The storage facilities (Coalberg) were then in private use and were not public service or common carrier facilities for interstate commerce, or operated as a railroad transit station available (as in this case) to all shippers under published and filed tariffs.

AB p. 5: The statement that "The storage yards x x are not located on Erie", is incorrect. Exhibit P-1 (R. 18A, 64) shows that the Coalberg property is located at the intersection of the Bergen County Railroad (which is the Erie freight cut-off) with N. Y. S. & W., and that there is a double track switch connection from the Bergen County railroad directly into the Coalberg storage property.

entirely independent of N. Y. S. & W. tracks. Exhibit P-12, (R. 54-58, 110) shows that Coalberg is a tariff freight station of Erie. In *Pattison & Bowns* v. *Saddle River Township*, 129 N. J. L. 135 (aff. 130 N. J. L. 177) this question was decided by the State Supreme Court, which held (p. 136) that Erie Railroad "trackage feeds the yard"; referring to the Coalberg storage plant.

AB p. 5: The statement that the Erie agreement with the Coal Company (Ex. P-4, R. 20, 83) was made "subsequent" to the Coal Company lease to Independent (Ex. P-5, R. 24, 83) ignores the fact that the Erie-Coal Company agreement was made, and was effective from, February 25, 1939, and the written agreement itself confirmed the agreement as of that date (Ex. p. 4, R. 20, 83; section 1, R. 22).

AB p. 5: While the *single* purpose of the Erie-Coal Company agreement mentioned in the brief, viz; "so that shipments of coal may not be diverted to other competing lines", is a perfectly legitimate one (*Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 41, 44), a perusal of that agreement will show that there were also other legitimate purposes, including:

> "That the said Coalberg Storage Yard will be operated as a public service facility for shippers * * * on Erie lines desiring storage space in accordance with and under rates named in a certain Tariff on file with the Interstate Commerce Commission * * *" (Ex. P-4, R. 20, 83; Section 2, R. 22).

AB p. 5-6: Reference is made to "intrastate shipments", and "local delivery". It is also stated that "The yard does some local business (R. 163)". That statement is part of an isolated sentence lifted out of the context of

the testimony, which, taken as a whole, shows that a minor portion of the stored coal goes by rail (only) to ultimate destinations in New Jersey as a continuation of the original shipping contract from Pennsylvania, as part of the interstate carriage, under the protection of the through routes and through rates, regulations and rules prescribed in the applicable tariff.

The statement at the bottom of page 6 that "The bulk of the business is with the Edgewater, N. J. Coal *yards*", is misleading. The statement of the witness was (R. 163) that "The bulk of the business was with the Edgewater Coal *Docks*", (correctly stated at the top of page 19 of Appellees' brief) which was the point of tidewater transfer "for continued transportation" thence to New York and New England by barges or vessels (R. 164). Most of the coal goes to New York (R. 112).

The fact that some of the coal goes to ultimate destinations in New Jersey is insignificant in this case, under *United States* v. *Erie R.R. Co.*, 280 U. S. 98, and other cases cited at pages 68-77 of Appellants' main brief. The uncontradicted evidence is that; (a) no coal is sold at Coalberg; (b) every ton of coal moves out of storage by rail under the protection of the through rate and as an originally intended continuation of the interstate carriage under the original shipping contracts from the mines in Pennsylvania, with the intention and contracts of both shipper and carrier that Coalberg should not be its final destination. The only possibility of any of this coal moving in intrastate commerce is in the event that a shipper violates the storage time limit of the tariff, and then makes a local shipment from Coalberg to some final destination in New Jersey (Ex. P-12, R. 54-58, 110, Rules (d), (e), p. 3), under a new intrastate shipping contract at local rates. There is no evidence that such a thing ever occurred. The tariff expressly provides

that its rates "do not apply for local delivery" (Rule (e) p. 3, R. 56) and that they "apply only to Rochelle Park (Coalberg), N. J., when for storage and reshipment" (Rule No. 1, p. 4, R. 57).

AB p. 6: The statement that "These Tariffs had existed since 1906" is not supported at record page 123 (as cited), or elsewhere in this record. The uncontradicted evidence is that the first transit tariff for the storage of coal by the railroad at Coalberg was issued January 24, 1939, effective February 25, 1939 (R. 54-58, 110).

AB p. 6: The statement that the agent maintained at the yard for the issuance of warehouse receipts "had been there for that purpose since at least 1929" creates an erroneous impression. The testimony referred to (R. 153, 154, 157, 158), shows that the witness, Thompson, had been employed, prior to February 25, 1939, by different employers, for the purpose of keeping records of warehouse receipts issued to individual private owners who requested "spot storage" for their coal. All this was changed "When the Erie took over" (R. 155) on February 25, 1939.

AB p. 6: The statement that at Coalberg "the coal leaves the possession and control of the common carrier and is delivered into the custody of the Warehouseman", is a distinction without a difference, since the warehouseman is the agent of the carrier. The applicable Tariff (Ex. P-1, R. 54-58, 110) clearly shows that the intention of the shipper and the carrier, and the actual fact, is that during storage, the carrier continues in possession of, and has a responsibility for, the coal under through shipping contracts.

AB p. 6: Appellees claim that shippers are given a "rebate" in the form of "free storage" at Coalberg (AB

pp. 5, 6, 13-14, 28, 46, 48). The same contention was presented, and argued, on behalf of the Township of Saddle River, in *Pattison & Bowns* v. *Saddle River Township*, 129 N. J. L. 135 (aff. 130 N. J. E. 177). On that issue the Court held:

> (p. 136) "Defendants next urge that 'no charge is made for storage' and therefore Independent Warehouses, Inc., is not 'engaged in the business of storing goods for hire'. In this argument, defendant fall into error. The storage charges are included in the tariff rates charged by Erie Railroad, whose trackage feeds the yard in question."

Whether the shipper receive "rebates" in the form of "free storage" is obviously a question foreign to the issues of, and cannot be collaterally raised or decided in, this case because they are questions which must be first presented to, and be considered and determined in an appropriate proceeding before, I. C. C. which has exclusive and plenary jurisdiction thereof under the Interstate Commerce Act.

In *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291, the Court said:

> "Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission."

The reason for that ruling is given in the succeeding portion of that paragraph of that opinion (p. 291).

"Unjust discrimination", as defined in the Interstate Commerce Act, includes "any special rate, *rebate*, drawback, or other device," &c. (49 U. S. C. A., sec. 2).

In *U. S.* v. *Wabash R. Co.*, 321 U. S. 403, 411, the Court said:

> "In determining whether there is a prohibited unjust discrimination or undue preference, it is for

> the Commission to say whether such differences in conditions exist and whether, in view of them, the discrimination or preference is unlawful."

The case of *B. & O. R. Co.* v. *United States*, 305 U. S. 507 (cited at pp. 14 and 46 of Apellees' brief) is an example. That decision reviewed an order of I. C. C. based on full findings of fact by the I. C. C. after hearing, whereas in the instant case there has been no hearing nor findings of fact by the Commission. Moreover, the *B. & O.* case is limited as a precedent to the special facts there involved. The Court at page 524 recognizes this explicitly by stating:

> "This is not to say that for every situation it is necessary that accessorial services should be rendered at not less than cost, rather than market or fair value. The Commission pointed out it was not condemning bona fide *storage-in-transit* for milling, manufacturing or processing, but only the storage practices indulged in here to get rail transportation." (Italics ours.)

AB p. 7-8: At this place the brief quotes from, and elsewhere (p. 6) refers to and cites, exhibits D-4, and P-11, which were omitted "as unnecessary" in the printing of the record in this Court. Notwithstanding that omission, Appellees' counsel have quoted from and cited those two omitted exhibits in support of his statements and argument.

Pursuant to Rule 13, pgf. 9, of the rules of this Court, Appellants filed their designation of record to be printed in this Court (R. 289). That rule imposed upon Appellants' counsel the duty to avoid an unnecessarily voluminous record by omitting all matter which he deemed unnecessary to the case on appeal. In the performance of that duty, Appellants' counsel designated as unnecessary certain spe-

cific parts of the record below, including exhibits D-4 and P-11. That designation was served upon Appellees' counsel (R. 289).

Paragraph 9 of Rule 13 also provides:

> "The adverse party, within ten days after service of the * * * designation required to be filed by appellant may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the appellant. The parts of the record so designated by one or both of the parties, and only those parts, shall be printed by the clerk."

Appellees' counsel did not file any designation of additional parts of the record which he thought material.

While it lies within our power to refute the implications of Appellees' brief relative to exhibits D-4 and P-11, by the use of other parts of those documents, we feel bound by the Rule above quoted to refrain from doing so. By the same token we believe that Appellants' counsel has improperly used, cited and mentioned those exhibits in his brief, and that the Court will either order such references stricken from Appellees' brief, or disregard them, and the statements and arguments based thereon, in its consideration of the case.

"Summary of the Argument."

AB p. 9: The decision in *Susquehanna Coal Co.* v. *South Amboy*, 228 U. S. 665 (decided in 1913), (and elsewhere referred to AB pp. 16, 19, 27) is cited in support of Appellees' contention that the interstate commerce status of the coal ceased when the coal was placed in storage at Coalberg. That case involved an entirely different state of facts. The

Susquehanna Coal Company mined the coal and shipped it to itself for future sale at South Amboy, where the shipping contract ended and the carrier made final delivery of the coal to the consignee. The Court sustained the property tax on the coal because the intended transportation movement had ended. There was no question of railroad transit storage, transit tariffs, or of through billing, or through routes or through rates from point of origin in Pennsylvania to ultimate destinations with stop-over privileges for in-transit storage and servicing.

In *Lehigh & Wilkes-Barre Coal Co.* v. *Junction*, 75 N. J. L. 922, (referred to at p. 28 of Appellees' brief) the New Jersey Court of Errors and Appeals sustained a property tax on coal under the same circumstances as in the *Susquehanna Coal Company* case.

On the contrary; under circumstances similar to those in the present case, the New Jersey Supreme Court set aside property taxes levied on coal in two cases, which have never been overruled, namely, *State* v. *Engle*, 34 N. J. L. 425, (decided in 1871) and *Lehigh & W. B. Coal Co.* v. *Carrigan*, 39 N. J. L. 35 both of which were distinguished from the case of *Lehigh & W. B. Coal Co.* v. *Junction*, 75 N. J. L. 922, at page 933, by the New Jersey Court of Errors and Appeals. The New Jersey court decision in *Lehigh & W. B. Coal Co.* v. *Carrigan*, was cited with approval by this Court in *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, 102, as authority for the contention Appellants make in the present case.

POINT I.

AB pp. 11, 26: Appellees' attempt to state Appellants' contention is inaccurate. An accurate statement of Appellants' contention in this respect is that, the license was

required as a prerequisite to the right of the Erie Railroad Company, a common carrier, to perform in-transit storage of shipments of anthracite coal moving in interstate commerce from mines in Pennsylvania to destinations in other states. The coal, while held in storage pursuant to tariffs filed with the Interstate Commerce Commission, was in the exclusive custody and possession of the Railroad Company. The coal is not subject to delivery or other local disposition at the storage point and the owners merely have the right to have the railroad transportation service completed for the movement beyond the storage point to ultimate destinations. Joint through rates applicable from the mines to final destinations are charged, plus a storage-in-transit charge, as shown in tariffs filed with the Interstate Commerce Commission.

AB p. 27: The statement that the shippers "were dealers in coal in quantities of from 50,000 to 100,000 tons (R. 166)" is erroneous, insofar as this record goes. We know nothing of the volume of tonnage dealt in by these shippers, except to the extent of their shipments through Coalberg. At that page the record shows that those were purely suppositious figures, qualified by the word "might", used by Appellees' counsel in a question on cross-examination. Exhibit P-10 (R. 49, 87-88) shows "Gross tons handled" in and out during 1941, 1942 and 1943. Exhibit P-17 (R. 60, 90) shows the actual amount of the various kinds of coal in storage on the first day of each month in 1942, 1943 and eight months of 1944. Those figures were never questioned, and they show that the purely suppositious figures above quoted from Appellees' brief are incorrect. The maximum and minimum total tonnages in storage of all kinds of coal and for all shippers, were as follows:

Year	Tons maximum	Tons minimum
1942	160,487.25	80,791.00
1943	96,771.80	19,360.00
1944	24,241.95	12,661.80

AB, p. 29: The statement that Chapter 162, N. J. P. L. 1945, p. 563, relating to franchise taxes "was not in effect when the convictions were had in the present case", is correct, and is so stated in Appellants' brief, but Appellees' brief neglects to mention R. S. 54:32A-8 (quoted in Appellants' brief, pp. 87-88), which was in effect at that time and provided for the imposition of franchise taxes exclusively by the State government, and franchise taxes were levied by the state upon, and were paid by, each of the corporate Appellants, including franchise taxes levied against Erie, part of which was allocated among, and paid to, the municipalities of the state, including the Township of Saddle River (Appellants' brief, pp. 90-92).

Appellees' brief contains the following significant quotations from cases there cited (italics ours):

> (p. 15) "The like taxation of property, shipped interstate, *before the movement begins, or after it ends*, is not a forbidden regulation" (italics ours).
>
> (pp. 15-16) "the merchandise has been transported in interstate commerce *and brought to its journey's end.*"
>
> (pp. 22-23) " x x the cotton x x, *has not begun to move in interstate commerce.*"

The important distinction in the present case is that interstate commerce has commenced, and it has not ended at the storage point. All of the parties to the shipping transaction, the shipping contract itself and the tariff, intended, and require, further rail transportation. The tariff expressly forbids local delivery at the storage point, and no facilities for local delivery are there provided.

POINT II.

The argument and authorities in Appellees' Point II are fully covered in Appellants' Point II (pp. 106-136), with the exception of the following observations:

AB, p. 31: Attention is called in Appellees' brief to the fact that "Appellants' attack is not against the statutes." In addition to what is said on this subject at pages 47-48 of Appellants' main brief, it is necessary only to note the decision of the Seventh Circuit in *Board of Trade* v. *Illinois Commerce Commission,* 156 Fed. (2d) 33, 36, which held:

> "The case was tried below and is presented here solely on the theory that the state law in question was superseded and rendered inoperative by federal enactment which has 'pre-empted' the field in controversy. If plaintiffs had succeeded below or if they succeed in this court, it would not mean that any provision of the Illinois law or Constitution has been invalidated. It would only mean that such law or constitutional provision is inapplicable to a situation such as the instant case."

That case involved a conflict between state and federal law relative to warehouse regulations, and the enforcement of the state law was enjoined.

AB p. 34: The brief states (p. 34) that the tax exemption of goods in commercial storage provided in R. S. 54:4-3.20 was based "on the ground that it was not entirely practical to correctly levy separate and individual assessments on the varied and often-times transient owners of such goods and that therefore, in some instances, because of the resulting confusion in such assessments, the enforcement of the provisions of the Tax Act in respect thereto brought about hardship and injustice. However, R. S.

54:4-3.20 was never intended by the legislature of New Jersey to grant to the owners of goods stored in public warehouses absolute immunity from paying their share of the burdens of government."

Appellees' brief erroneously infers that the legislature in enacting that tax exemption "reached the conclusion that the public interest would be best served and fully protected by license fees for revenue imposed under the (licensing) provisions of R. S. 40:52-2 * * * and R. S. 40:52-1(g) * * *."

Rule 71 of the Rules of the Assembly (1925), where this bill was introduced, provides:

> "Each member when introducing a bill shall submit with each copy of the bill a statement setting out the objects proposed to be accomplished by its enactment * * *, which statement shall be referred to the Committee with the bill. An equal number of copies of such statement and bill shall be printed and a copy of the statement shall be attached to each copy of the bill," *Fitzgerald's Legislative Manual, State of New Jersey, 1925, p. 628.*

This tax exemption was enacted by Chapter 221, N. J. P. L. 1925, pp. 537, 542. Pursuant to the above quoted rule, there was attached to, and printed as a part of, the bill for that statute introduced in the legislature the following statement:

> "The object of this bill is to enable warehousemen in the State of New Jersey to compete successfully with warehousemen in neighboring states where the property of the patrons of such foreign warehousemen is relieved from taxation. Any loss in taxes would be more than offset by the increased taxable property resulting from their growth if this handicap is removed."

Tax exemption under that act was challenged before the state Supreme Court, in *Schwartz* v. *Essex County Board of Taxation*, 129 N. J. L. 129. At page 133 of the opinion the Supreme Court said:

> "A state, by adjusting its taxing system so as to favor certain industries or businesses does not thereby deny equal protection of the laws."
>
> . . . . . .
>
> "There no longer exists any doubt but that the legislature is competent to classify objects of legislation, and this includes classifications for the purpose of taxation and exemptions from taxation."

Concerning the object of this tax exemption law, as set forth in the above quoted statement attached to the bill for the act, the opinion reads (p. 134):

> "The exemption statute applies to all personal property stored in a warehouse and it includes all property within the state so situated, omitting none. The depositions taken by rule of the court indicate clearly that persons and corporations engaged in the business of storing goods for hire in warehouses were unable to compete profitably with competitors in the neighboring states of Pennsylvania and New York by reason of the fact that those states do not tax personal property; that as a result, goods which might otherwise have been stored in warehouses located in New Jersey, were diverted by the owners thereof to warehouses located in states where the property stored would not be subjected to taxation. In order to place New Jersey warehouses on an equal footing with other competitors in the two states named, the legislature saw fit to grant exemption from taxation on personal property so stored. In *Burlington Distilling Co.* v. *State Board of Assessors*, 86 N. J. L. 92; *affirmed*, 87 Id. 315, the court

> said: 'A legislative policy exhibiting such a liberal scheme of industrial encouragement should not receive a construction so narrow and illiberal as to subvert the very policy which quite obviously such legislation was intended to erect and subserve.' A legislative policy of encouraging industry or business by granting exemption from taxation is both logical and reasonable."

That decision of the state Supreme Court was affirmed, on the opinion below, by the New Jersey Court of Errors and Appeals, *same case*, 130 N. J. L. 177. No attempt was made to review that decision in this court, and the decision in that case has not been reversed, or questioned, in any subsequent decision of the state courts.

The above quoted statement, and court decision, demonstrate two things in this case:

(a) If, as Appellees here contend, there was no change in the method of operation of Coalberg plant after February 25, 1939 when it became a public service facility for in-transit storage of interstate commerce, the owners of the coal would not have paid taxes on the coal, but would have claimed this exemption for each year between March 21, 1925, the effective date of the exemption act, and the tax year of 1940, as the owners of the coal did for the tax years 1940 and 1941.

(b) The object of the bill was an absolute tax exemption, and the legislature did not contemplate the substitution of license fees for revenue as a means of defeating the plainly stated object of the tax exemption, and that statement and decision show that the legislature did not "intend to leave to the municipalities the power to tax under other existing statutes" (AB, pp. 34-35).

AB p. 46: The suggestions that the modifying of the "filed tariff rates" "need not be done if a direct charge for storage be made on the storer by the warehouse company", and, at page 48, that the "license fee" could be "passed along to the buyers of the coal", display a disregard of federal laws in the following respects:

(a) The cost of coal could not be increased by passing this license fee "along to the buyers of the coal". That was prohibited by the Emergency Price Control Act of 1942 (*50 U. S. C. A., Appendix, Sec. 901, et seq.*) and the Inflation Control Act of 1942 (*50 U. S. C. A., Appendix, Sec. 961*), and the O. P. A. regulations issued pursuant to those acts fixing positive ceilings on the prices of coal.

(b) An increase in the storage rates was prohibited under section 942 (c) of the Price Control Act, *Lincoln Savings Bank* v. *Brown*, 137 Fed. (2d) 228, 230.

(c) Any increase in the carrier's tariff charges was restricted by the President's Executive Order No. 9328 (April 18, 1943). Paragraph 4, thereof provided:

> "The attention of all agencies of the Federal Government, *and of all State and municipal authorities, concerned with the rates of common carriers* or other public utilities, is directed to the stabilization program of which this order is a part so that *rate increases will be disapproved* and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state or municipal law, in order to keep down the cost of living and effectuate the purposes of the stabilization program." (Italics ours.) (50 App. U. S. C. A. pg. 318.)

On October 2, 1942 the Emergency Price Control Act was amended to provide:—

"No common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase" (Title 50, App. U. S. C. A., Sec. 961).

These provisions of the law, and the status of O. P. A. as an intervenor in a public utility rate case, were considered in *Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489 (decided March 27, 1944).

(d) The federal price control acts and regulations limited not only the price of the coal (M. P. R. No. 112, secs. 1340.191, 1340.200; G. M. P. R. (March 11, 1943) Secs. 1499.1, 1499.2, pgf. (a) (1)), but also, the intransit storage rates on coal (M. P. R., Sec. 1340.198, pgf. (t)).

(e) The Interstate Commerce Act (Sec. 15, pgf. 7) requires a 30-day notice of changes in tariff rates, including accessorial charges such as in-transit storage rates, and such changes are subject to suspension by, hearing before, and disapproval of, I. C. C.

(f) The record shows that the Coalberg transit facilities for anthracite coal were the only ones on the Erie lines (R. 112); that this transit service was a necessary element of Erie's competition with other anthracite carriers (R. 112-113); and that the transit storage rates, as well as the transportation rates, for anthracite coal are the same on all competing carriers (R. 114). Obviously, if the transit charges at Coalberg were increased to cover this license fee, an illegal discrimination would result against shippers over the lines of Erie and participating and connecting car-

riers, under this tariff, which I .C .C. would have authority to remove (*Central R. Co.* v. *United States*, 257 U. S. 247, 257).

AB pp. 48-49: The per-square-foot rates of other license fees in the Township are mere self-serving computations. No other business or property in the Township is licensed on a square foot basis. Exhibits P-13 (R. 50-51) and P-14 (R. 52) list all of the other businesses licensed in the Township, and show that only lump sum fees in dollars are prescribed regardless of ground areas. Appellants' main brief (pp. 115-116) gives a comparison of those license fees with the one here in question.

AB p. 49: Here is cited *North Hudson Co. Ry. Co.* v. *Hoboken*, 41 N. J. L. 71. It is significant that that decision held that a municipality could not require the obtaining of a license for, or impose regulations or excise taxes upon, the conduct of the business of a corporation which had its franchise from the state. To the same effect are *State* v. *Jersey City*, 29 N. J. L. 170; *Pennsylvania R. Co.* v. *Jersey City*, 84 N. J. L. 716; *Jersey City* v. *Erie R. R. Co.*, 84 N. J. L. 761.

AB p. 51: Here the argument erroneously states that the "agents, and servants (of Appellants) could continue this business with immunity" "unless the foreign corporate entity" (of some of these corporate Appellants) "appeared of its own volition within the municipal jurisdiction."

This record shows that all three corporate Appellants are authorized to conduct their business in New Jersey. The New Jersey corporation law (R. S. 14:4-2) requires that:

> "* * * every foreign corporation authorized to transact business in this state, shall maintain a principal

office in this state and an agent in charge thereof upon whom process against the corporation may be served."

In default of compliance with that statute, the civil practice act (R. S. 2:26-47) provides that service upon a foreign corporation doing business in New Jersey may be effected by service upon the Secretary of State.

POINT III.

This point needs no answer other than set forth in Point III (pp. 137-150) of Appellants' brief.

POINT IV.

This point needs no answer other than set forth in Point IV (pp. 151-159) of Appellants' brief, except:

AB p. 56: It erroneously states that the penalty clause in R. S. 40:49-5 used in this ordinance "is the penalty clause used for the enforcement of all ordinances in New Jersey." As pointed out in Appellants' brief (p. 155) that section does not apply to licensing ordinances at all. Licensing ordinances are authorized exclusively under Sub-title 52 of Title 40 of Revised Statutes, which is a separate and distinct statutory compartment relating exclusively, and to the exclusion of all other statutory provisions, to licensing ordinances, and the only penalty authority contained in that sub-title is contained in R. S. 40:52-6, which is entirely different from that contained in R. S. 40:49-5.

AB p. 58: The citation of, and quotation from, *D. L. & W. R.R. Co.* v. *Central Stockyard & Transit Co.*, 45 N. J. E. 39, is inapposite, because of the fact that the in-transit facilities and services at Coalberg are provided by a

common carrier in interstate commerce as public service facilities and services *available to all shippers*, and are prescribed in, and governed by, a duly filed tariff. The only limitation upon the obligation of the carrier to comply with the demands of all shippers for such services is the capacity of those facilities (Ex. P-12, 54, 109, p. 3, lines 4-7, R. 56).

AB p. 59: The statement that Appellants failed to make any attack upon this ordinance until after these convictions, is incorrect, and the quotation from *Wadley So. Ry.* v. *Georgia*, 235 U. S. 651 is inapplicable. The Ordinance was enacted January 25, 1943 (R. 7). On April 19, 1943, before any enforcement of the ordinance was attempted, Appellants instituted suit in the United States District Court for the District of New Jersey to enjoin the enforcement of the ordinance and a preliminary restraining order was granted. That action was disposed of by order entered November 23, 1943 (Appellants' brief, pp. 9-10). The first attempt to enforce the ordinance occurred on November 30, 1943, ten months after its adoption, when Independent and Thompson were arraigned and convicted of violation of the ordinance (R. 6). By December 13, 1943, (within 13 days), Appellants had prepared their papers, arranged for a hearing on their application for, and obtained writs of certiorari to review the convictions (R. 1). Certainly, there can be no justification for a charge of delay on the part of Appellants.

AB p. 60: It is stated that Appellants could have "(a) discontinued further business in Saddle River Township until the matter was determined, or (b) paid the license fee under protest and recovered it back in the event they were successful in maintaining their position."

(a) It is idle to say that Erie could have embargoed all shipments of coal in and out of Coalberg, and suspended all warehouse and storage services, and protection, while the applicable tariff was in effect.

Numerous decisions of I. C. C. (of which *Humble Oil & Ref. Co.* v. *Director General*, 73 I. C. C. 275, 276 and *American Mfg. Co.* v. *Director General*, 77 I. C. C. 52, 57 are examples) describe the circumstances under which an embargo is lawful. A tax dispute, or an interdictive ordinance requiring a license as a condition precedent to furnishing the service, is not a lawful justification for an embargo.

Erie could not cancel its storage tariff without the 30-day notice required by section 15, paragraph 7 of the Interstate Commerce Act. Such a cancellation would be subject to possible suspension on complaint of a shipper, or on the Commission's own motion; and, in case of such objection, an order of I. C. C. after hearing, would be required before cancellation could become effective, if I. C. C. approved the cancellation.

Embargoes do not have retroactive effect and are not applicable to cars billed from point of origin prior to the effective date of an embargo notice. *The Transit Case*, 25 I. C. C. 130, 133;

In *Grain Products from Gulf Ports to Atlantic Seaboard* 222 I. C. C. 705, 714, the Commission held:

> "It is well settled that in connection with a through shipment, where the continuity of movement is interrupted under a transit arrangement, the rates in force on the date of the original shipment are applicable. To find otherwise would make it possible to change the rate on a shipment while, under the fiction of transit, it is en route."

See also *Great Atl. & Pac. Tea Co.* v. *Alton R. Co.*, 226 I. C. C. 378, 401.

Hence, neither an embargo, nor a cancellation of the tariff, could affect the carrier's duty to the shipper respecting the coal already in, or en route to, storage.

Any arbitrary suspension of this service would expose the carrier to damage claims by shippers, and penalties under the Interstate Commerce act, not to mention the public hardship of being deprived of the use of coal during winter months.

Nothing which the carrier could do would relieve it of the custody, or its responsibility for the warehousing service, of the coal while it still remained in storage under tariff provisions.

This alternative was neither legal nor practicable.

(b) The ordinance was adopted January 25, 1943, and provided that the license fee should be prepaid in advance on or before the first of January of each year. No attempt to enforce the ordinance was made until November 30, 1943. Under the law of New Jersey, as it then stood, and had stood without change since 1909 (a period of 36 years), *Atlantic City R.R. Co.* v. *Ventnor City*, 77 N. J. L. 354, no license fee was due for the calendar year 1943.

This ground of objection to their convictions was presented by Appellants in the present case in their "Reasons" filed in the state Supreme Court (R. 17, Reason 1, pgf. (n)), but was not ruled on by that Court because the case was decided favorably to Appellants on other grounds (R. 255-257). The same ground was urged and briefed by these Appellants in the Court below, but it, too, decided the case on other grounds, without reference to this point.

Certiorari proceedings in the state Supreme Court after conviction was the appropriate remedy to challenge the

application of the ordinance, and to review the convictions thereunder (R. S. 2:81-13, quoted in Appellants' brief, p. 10). In *Lipkin* v. *Duffy*, 119 N. J. L. 366, the New Jersey Court of Errors and Appeals considered a case in which the party had failed to apply for a license under a municipal ordinance, and prepay the license fee, and sustained the procedure followed by Appellants in the present case. The Court held (p. 369):—

> "When such a situation is presented, it is proper practice to test the ordinance upon *certiorari* after conviction."

No claim was made in either of the Courts below on behalf of present Appellees, or suggested in the opinions of either of those Courts, that Appellants should have adopted either of the alternatives now suggested for the first time.

Under these circumstances Appellants were justified in the course they pursued, and are not subject to criticism for not adopting either of the alternatives (a) or (b) suggested in Appellees' brief (p. 60).

Respectfully submitted,

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